No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

IN RE: HAROLD F. YOUNGER,

*Debtor.*

DONNA E. YOUNGER,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the postpetition costs of providing medical services and health care to an individual debtor under Chapter 7 of the Bankruptcy Code while he is being held in the custody of the United States Marshals Service as ordered by a bankruptcy court pursuant to FED. R. BANKR. P. 2005 are "administrative expenses" of the estate or personal postpetition expenses of the debtor.

## LIST OF ALL PARTIES TO THE PROCEEDINGS

Donna E. Younger

United States of America

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ON PETITION FOR A WRIT OF CERTIORTARI TO THE UNITED STATES DISTRICT COURT FOR THE ELEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

*In re Younger*, 163 B.R. 609 (Bankr. S.D. Ga. 1993), reproduced herein at Appendix 16a-23a; *Younger v. United States of America (In re Younger)*, 165 B.R. 965 (Dist. Ct. S.D. Ga. 1994), reproduced herein at Appendix 5a-15a; *Younger v. United States of America (In re Younger)*, No. 94-8573

(11th Cir. March 27, 1995), reproduced herein at Appendix 1a-2a.

## STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 27, 1995. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1).

Subject matter jurisdiction in the District Court for the Southern District of Georgia was pursuant to 28 U.S.C. § 1331. Petitioner Donna E. Younger placed her former husband, Harold F. Younger, in involuntary Chapter 7 Bankruptcy. *See* 11 U.S.C. § 303(b). This case arises out of an application by the United States for treatment of certain expenses as administrative expenses within that Bankruptcy proceeding.

## STATUTES INVOLVED

Section 503 of the Bankruptcy Code provides:

> **§ 503 Allowance of administrative expenses.**
>
> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-
>
> > (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; . . . .

11 U.S.C.A. § 503 (1993 & Supp. 1995).

Section 521 of the Bankruptcy Code provides:

> The debtor shall—
>
> (1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;
>
> * * * *
>
> (3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;
>
> (4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recording information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title; and
>
> (5) appear at the hearing required under section 524(d) of this title.

11 U.S.C.A. § 521 (1993).

18 U.S.C. § 4007 provides:

> The expenses attendant upon the confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States in the manner provided by law.

18 U.S.C.A. § 4007 (1985).

## STATEMENT OF THE CASE

### A. Factual Background.

This is a Chapter 7 involuntary bankruptcy proceeding which followed a highly contested divorce proceeding. On January 19, 1992, the Superior Court of Chatham County, Georgia, awarded Donna E. Younger ("Ms. Younger") a judgment of $912,635.00 against her former husband, Harold F. Younger ("Mr. Younger" or "Debtor"). After learning that Mr. Younger had transferred and concealed assets in an attempt to evade the divorce judgment, Ms. Younger filed a petition on March 27, 1992, to place Mr. Younger in involuntary bankruptcy. The Bankruptcy Court for the Southern District of Georgia ("bankruptcy court") subsequently issued orders for Mr. Younger to submit to an examination and to file a schedule of assets and liabilities under FED. R. BANKR. P. 2004. Mr. Younger did not comply with either of these orders. On May 21, 1992, the bankruptcy court entered an order for relief. App. 16a-17a.

Ms. Younger moved the bankruptcy court on June 11, 1992, for an order to bring Mr. Younger before the court for the purpose of a hearing in accordance with FED. R. BANKR. P. 2005(a). Following withdrawal of the reference to the bankruptcy court for the limited purpose of considering that motion, the District Court for the Southern District of Georgia ("district court") ordered the United States Marshals Service ("Marshals Service") to apprehend and bring Mr. Younger before the court. Mr. Younger was arrested and brought before a United States Magistrate Judge in Jacksonville, Florida, who then ordered that Mr. Younger be transferred to the Southern District of Georgia. App. 16a-17a.

During examination on June 27, 1992, Mr. Younger invoked the Fifth Amendment privilege against self-incrimination in response to virtually every question concerning his estate. The U.S. Attorney for the Southern District of Georgia subsequently petitioned the district court for an order granting

Mr. Younger use and derivative use immunity. Despite being granted immunity, Mr. Younger continued to refuse to comply with the court's order to submit to a Rule 2004 examination. On November 20, 1992, the district court ordered that Mr. Younger be incarcerated for refusing to testify. App. 16a-17a.

While in the custody of the Marshals Service, Mr. Younger was hospitalized with heart problems and underwent surgery. Mr. Younger later underwent surgery, while still in custody, to correct gall bladder problems. The Marshals Service contends that it incurred, assumed, or paid a total of $105,066.49 in medical and health care expenses for Mr. Younger. The Marshals Service also contends that it incurred, assumed, or paid a total of $6,787.96 in costs locating and apprehending Mr. Younger. App. 18a.

**B. Proceedings Below.**

The United States filed an application with the bankruptcy court seeking to recover these costs from the bankruptcy estate as administrative expenses. App. 18a. The application was granted by the bankruptcy court which stated two bases for its decision. First, the bankruptcy court found "the expenses and costs were necessary and have served to preserve the estate" because Mr. Younger's incarceration prevented him from further transferring and concealing his assets. App. 22a. Second, the bankruptcy court reasoned that the power to incarcerate a debtor to ensure compliance with federal law is so critical to the viability of the bankruptcy process that costs incident to incarceration deserve priority classification. App. 22a.

This decision was affirmed by the district court on the ground that the costs and expenses related to Mr. Younger's incarceration were actual and necessary costs of preserving the estate. App. 11a-12a. The district court held that the costs of Mr. Younger's incarceration necessarily included the costs of the medical care, so that those expenses were also

entitled to administrative expense status. App. 15a. The district court rejected the second of the two bases for the bankruptcy court's decision, reasoning that the costs were not incident to the operation of a debtor's business. App. 15a.

The United States Court of Appeals for the Eleventh Circuit ("court of appeals" or "Eleventh Circuit") affirmed the district court's order without opinion. App. 1a-2a.

## REASONS FOR GRANTING THE WRIT

The Eleventh Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings which calls for the exercise of this Court's power of supervision. *See* SUP. CT. R. 10.1(a). The allowance of a debtor's postpetition personal medical expenses as an administrative expense of a bankruptcy estate is contrary to one of the most important, if not the most important, concepts implicated in a bankruptcy proceeding—i.e., the separation of the bankruptcy estate and prepetition liabilities from the debtor's postpetition estate and on-going postpetition expenses. The judicial decisions establish that a postpetition claim must confer an actual benefit upon the bankruptcy estate for that claim to be classified as an administrative expense, whereas the Eleventh Circuit in this case sanctioned administrative expense priority based upon a potential benefit to the estate. The departure from the accepted and usual course of judicial proceedings by the Eleventh Circuit on such an important issue necessitates review by this Court. *See e.g.*, *City of New York v. Saper*, 336 U.S. 328, 329 (1949) ("We granted certiorari to resolve the conflict, the matter being of considerable practical importance in the administration of the Bankruptcy Act").

In *Reading Co. v. Brown*, 391 U.S. 471 (1968), this Court granted certiorari to determine whether the negligence of a receiver administering a bankruptcy estate gave rise to an "actual and necessary" cost of operating the debtor's business

"because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court." *Id.* at 475. This case presents the issue of whether a debtor's personal medical expenses while incarcerated are "actual, necessary costs and expenses of preserving the estate" in a liquidation proceeding under Chapter 7 of the Bankruptcy Code, and like *Reading* presents an issue of first impression in this Court. The Eleventh Circuit's treatment of such medical expenses as administrative expenses of the estate releases the debtor from personal obligations and imposes these liabilities upon prepetition creditors who are not statutorily obligated to pay such costs.

## THE ELEVENTH CIRCUIT HAS SANCTIONED A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS FOR DETERMINING WHICH CLAIMS HAVE ADMINISTRATIVE EXPENSE PRIORITY

### I. The Debtor's Medical Expenses Did Not Confer an Actual Benefit on the Estate.

Section 503(b) of the Bankruptcy Code establishes several specific classes of postpetition claims as "administrative expenses." *See* 11 U.S.C. § 503(b). Administrative expenses are paid out of the bankruptcy estate as "first priority" claims ahead of other claims against the estate, rather than being treated as obligations of the debtor personally although such claims arise after the filing of a bankruptcy petition. 11 U.S.C. § 507(a).

The debtor has no obligation to pay for administrative expenses and, conversely, the estate has no obligation to pay for the debtor's postpetition personal expenses. *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986); *In re Walter*, 83 B.R. 14, 19 (Bankr. 9th Cir. 1988). Indeed, there is no statutory authority for a bankruptcy court to provide for the

personal expenses of a debtor out of property of the estate should it desire to do so. *In re Vincent*, 4 B.R. 21, 23 (Bankr. M.D. Tenn. 1979). Thus, the debtor's necessary postpetition living expenses must come from employment obtained subsequent to the filing of the bankruptcy proceedings, from borrowing funds, from gifts, or otherwise. *Id.* at 23; *In re Dervaes*, 81 B.R. 127, 128 (Bankr. S.D. Fla. 1987).

Among the claims entitled to treatment as administrative expenses are those which arise from "the actual, necessary costs and expenses of preserving the estate. . . ." 11 U.S.C. § 503(b)(1)(A). In this case, the district court affirmed the bankruptcy court ruling on the ground that the costs and expenses related to Mr. Younger's incarceration were actual and necessary costs of preserving the estate. App. 11a-12a. That determination is a departure from the usual judicial construction of the statutory phrase "actual, necessary costs and expenses of preserving the estate." As Mr. Younger's medical expenses are postpetition obligations of a personal nature, rather than actual and necessary costs of preserving the estate, those expenses must be satisfied from postpetition assets.

That the Marshals Service incurred costs while Mr. Younger was in its custody does not obligate the estate to pay those expenses. To treat such postpetition costs as expenses of the estate rather than of Mr. Younger is to release Mr. Younger from those debts incurred during his incarceration for avoiding his legal obligations and for contempt of court. Any payment to the United States would, accordingly, directly reduce the recovery by Mr. Younger's prepetition creditors, whose only source of recourse is against prepetition assets, while relieving Mr. Younger of his accountability for personal debts.

Because the allowance of a claim as an administrative expense entitles the claimholder to payment of the claim as a first priority, the statute is strictly construed to limit such claims. *Broadcast Corp. of Georgia v. Broadfoot*, 54 B.R.

606, 611 (N.D. Ga. 1985), *aff'd, Broadcast Corp. of Georgia v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530 (11th Cir. 1986); *In re Hemingway Transport, Inc.*, 954 F.2d 1, 4-5 (1st Cir. 1992); *In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 482, 488 (Bankr. S.D.N.Y. 1991); *In re Englewood Community Hospital Corp.*, 117 B.R. 352, 358 (Bankr. N.D. Ill. 1990); *In re Grant Broadcasting of Philadelphia, Inc.*, 71 B.R. 891, 897 (Bankr. E.D. Penn. 1987); *Hassett v. Revlon, Inc. (In re O.P.M. Leasing Services, Inc.)*, 23 B.R. 104, 121 (Bankr. S.D.N.Y. 1982). *See generally, Otte v. United States*, 419 U.S. 43, 53 (1974).

This strict construction is particularly appropriate in Chapter 7 cases, such as the one at hand, as the estate is liquidated rather than reorganized. *Broadcast Corp.*, 54 B.R. at 611. "Since the goal in a Chapter 7 case is to 'cash out' the bankrupt entity, rather than continue its operations, Chapter 7 is more concerned with maximizing the size of the estate to be distributed than with the Chapter 11 goal of inducing third parties to contribute towards the continued operation of the business." *Id.* at 611. Both the rationale for treating certain claims as administrative expenses and the effect of such classification require a narrow construction of the class of claims entitled to administrative expense treatment.

Because the allowance of a claim as an administrative expense diminishes the recovery of prepetition creditors, the usual course of judicial proceedings is to classify as administrative expenses solely those postpetition expenses that confer an *actual* benefit upon the bankruptcy estate. *See e.g., Broadcast Corp. of Georgia v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d at 1532; *Boyd v. Dock's Corner Associates (In re Great Northern Forest Products, Inc.)*, 135 B.R. 46, 59 (Bankr. W.D. Mich. 1991); *In re ICS Cybernetics, Inc.*, 111 B.R. 32, 36 (Bankr. N.D.N.Y. 1989); *In re O.P.M. Leasing Services, Inc.*, 23 B.R. at 121. "The use of the words 'actual' and 'necessary' [in § 503(b)] indicate that the estate must accrue a real benefit from the

transaction for which the claim is being filed. *The mere potential of benefit to the estate does not satisfy this requirement.*" *Broadcast Corp.*, 54 B.R. at 611 (emphasis added). *See also*, *In re ICS Cybernetics*, 111 B.R. at 36; *Marion Corp. v. Louisiana Gas Systems, Inc. (In re Marion Corp.)*, 67 B.R. 487, 490 (Bankr. S.D. Ala. 1985) (benefit to estate must be measurable); *In re Rhymes, Inc.*, 14 B.R. 807, 808 (Bankr. D. Conn. 1981).[1]

The district court held that Mr. Younger's medical expenses benefitted the estate to the extent that Mr. Younger was prohibited from further concealing himself or his assets. App. 12a-13a. The district court did not, however, find to what extent that "benefit" existed, nor could it as there was no "actual" benefit. A debtor's medical expenses do not confer an actual benefit upon the estate as they preserve the debtor personally rather than the estate. Preserving the debtor's life may result in some tangential benefit to the estate, but that does not convert personal medical expenses into administrative expenses any more than prolonging the debtor's life converts the debtor's housing expenses or other daily costs of living into administrative expenses. *See In re Vincent*, 4 B.R. 21 (Bankr. M.D. Tenn. 1979) (refusing to permit payment of

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[1] In *Reading Co. v. Brown*, 391 U.S. 471 (1968), this Court held "that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement." *Id.* at 485. *Reading* has been cited by various courts of appeals for the proposition that in a reorganization proceeding under the Bankruptcy Code administrative expenses are not limited to those claims that actually benefit the estate. *See e.g.*, *Alabama Mining Comm'n v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.)*, 963 F.2d 1449, 1454 (11th Cir. 1992). These decisions are not applicable to a Chapter 7 proceeding as they all arose from proceedings under Chapter 11 of the Bankruptcy Code. *See In re Hemingway Transport, Inc.*, 954 F.2d 1, 4-5 (1st Cir. 1992) (stating *Reading* criteria inapplicable to Chapter 7 proceeding); *Younger v. United States (In re Younger)*, 165 B.R. 965, 971 (S.D. Ga. 1994) (distinguishing *In re N.P. Mining* and *Reading* from the Chapter 7 case under consideration).

necessary living expenses from assets of estate despite fact debtor suffered a heart attack). The indirect benefit to the estate from providing medical care to a debtor is not what courts ordinarily refer to as an "actual" or "measurable" benefit to the estate.

The benefit to the estate referred to by both the bankruptcy court and the district court was merely potential. Neither court could identify any specific asset or amount of money which the Debtor would have concealed but for his incarceration, nor could either court connect the Debtor's medical expenses to a quantifiable benefit to the estate. Potential benefits can not form the basis for administrative expense claims. A creditor is only granted administrative expense priority status when the estate has actually received a measurable benefit from the expense. *Broadcast Corp.*, 54 B.R. at 611.

The Marshals Service is not entitled to priority in the distribution of the bankruptcy estate simply because it paid a personal obligation of Mr. Younger. "[T]he administrative expense scheme does not focus in the first instance on whether a creditor sustained a loss during this period, but on whether the estate has received an actual benefit." *Broadcast Corp.*, 54 B.R. at 611. Incurring expenses which confer an indirect benefit does not entitle a postpetition creditor to priority in the distribution of the bankruptcy estate. *Kinnan & Kinnan Partnership v. Agristor Leasing*, 116 B.R. 162, 166 (Dist. Neb. 1990); *In re Speeds Billiards & Games, Inc.*, 149 B.R. 434 (Bankr. E.D. Tex. 1993); *In re Jack Winter Apparel, Inc.*, 119 B.R. 629 (Bankr. E.D. Wis. 1990); *In re Ram Manufacturing, Inc.*, 38 B.R. 252, 254 (Bankr. E.D. Penn. 1984); *In re ICS Cybernetics, Inc.*, 111 B.R. at 36.

If Mr. Younger had not been incarcerated when he received medical treatment, it could not be contended that the costs of such treatment are administrative expenses simply because prolonging Mr. Younger's life may lead to the recovery of assets concealed by him. To the contrary, those expenses

would simply be treated as postpetition claims to be recovered from postpetition assets. The only difference in this case is that Mr. Younger was being held by the Marshals Service in an attempt to compel him to perform his legal obligations at the time of his medical treatment. That circumstance does not change the nature of the medical expenses from personal obligations into obligations of the estate. Simply stated, the estate's ability to pay a claim does not obligate it to do so when there is no actual and quantifiable benefit to the estate.

## II. Extraordinary Medical Expenses Are Not "Necessary" Costs of Preserving the Bankruptcy Estate.

A debtor's medical expenses are not "necessary" costs of preserving the bankruptcy estate because those costs are the statutory obligation of either the debtor personally or of the United States. *See* 18 U.S.C.A. § 4007 (1985); 11 U.S.C. § 502 (1994). A debtor is required by § 521 of the Bankruptcy Code to provide particular information regarding property of the estate and to turn over that property. *See* 11 U.S.C.A. § 521 (1993). These are statutory duties, and the debtor is not entitled to compensation for performing them, much less to the treatment of any costs incurred by complying with the statute as administrative expenses. Thus, it was held in *In re Neese*, 137 B.R. 797 (Bankr. C.D. Ca. 1992), that "the value of Debtors' services was not a 'necessary' expense because those services were already pledged to the estate by the act of filing bankruptcy." *Id.* at 800 (citing *In re Roco Corp.*, 37 B.R. 770, 773 (Bankr. D.R.I. 1984)). In the case *sub judice*, the Debtor was only incarcerated because he refused to comply with the duties required by § 521. Because the Debtor can not claim compensation for the costs of performing his statutory duties, the costs of attempts to compel him to do so should not be considered "necessary" expenses.

The Debtor's personal medical expenses are not expenses of the estate because they are the statutory obligation of

the United States. *See* 18 U.S.C.A. § 4007 (1985). The district court erroneously concluded that 18 U.S.C. § 4007 did not require the United States to bear the costs of the debtor's medical treatment. App. 14a n.5. That section provides:

> The expenses attendant upon the confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States in the manner provided by law.

18 U.S.C.A. § 4007 (1985). Thus, the United States is statutorily obligated, at least initially, to pay the costs incurred as a result of the incarceration of a debtor who violates provisions of the bankruptcy code. The district court states that "nothing in the statute prevents the United States from seeking repayment from the responsible party." App. 14a n.5. The court, however, incorrectly found the responsible party to be the bankruptcy estate rather than Mr. Younger.

It was held that the precursor to 18 U.S.C. § 4007, which was substantially identical in its scope to the current statute, prevented the recovery from a bankruptcy estate of the costs of confining a debtor charged with contempt. *See e.g., In re Lenka*, 295 F. 570 (E.D.N.Y. 1923); *In re Centrone Coal Co., Inc.*, 6 F. Supp. 628 (E.D.N.Y. 1934). In *Lenka*, the court stated:

> Consideration has been given to the suggestion that, as the creditors directly benefit by the exercise of this power of the court, particularly where the bankrupt finally obeys the order and pays over money as directed, they should defray such necessary expenses as may be involved in carrying the order into effect; but the general public interest is involved in obedience to all lawful orders made by the court, which is itself one of the three great branches into which the government is divided, and

> it devolves upon the government itself to provide funds necessary to enable the court to properly and completely protect the rights of all suitors whose claims are presented for determination, and who apply for protection of the rights to which every litigant is entitled.

*Lenka*, 295 F. at 571. Thus, the court held that the government, and not creditors, was liable for maintenance of a bankrupt committed for contempt. *Id.* As the two statutes are substantively identical,[2] the result in the case under consideration should have been the same. Inexplicably, the district court noted that "in the criminal context this statute [18 U.S.C. § 4007] serves as authorization for U.S.S.G. § 5E1.2(i). Pub. L. 100-690, 102 Stat. 4463 (1988)" and that "Section 5E1.2(i) permits a court to impose an additional fine *upon a convicted defendant* in an amount 'at least sufficient to pay the costs to the government of any imprisonment. . . .'" App. 14a n.5 (emphasis added). Thus, it is Mr. Younger against whom the United States should seek to recover its costs, not the bankruptcy estate.

Assuming, *arguendo*, that the cost of incarceration could be treated as a "necessary" expense, it does not follow that the costs of medical treatment are "necessary costs and expenses *of preserving the estate*. . . ." 11 U.S.C. § 503(b)(1)(A) (emphasis added). The medical costs are properly separated from the other costs of incarceration because as extraordinary surgical expenses they are not an inherent component of being

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[2] The precursor to 18 U.S.C. § 4007 stated:

> § 701. *Expenses for transportation and confinement of prisoners paid by United States.* All the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States in the manner provided by law.

18 U.S.C. § 701 (quoted in *In re Centrone Coal Co., Inc.*, 6 F. Supp. at 629).

incarcerated like the costs of feeding a prisoner are. Similarly, if Mr. Younger had committed a tort while incarcerated, such as assaulting a fellow prisoner or a guard, it could not be contended that the claim for damages from such a tort is an administrative expense. Such a claim would be a personal obligation of Mr. Younger's arising from an act that is not an inherent component of his incarceration. In the same way, Mr. Younger's personal medical expenses are not estate obligations regardless of whether the other actual costs of incarceration are. Even when administrative expense priority exists for a particular claim, those elements of the claim that are tangential to the preservation of the estate and arise from the debtor's conduct or condition should be disallowed. No administrative expense priority exists unless an actual and measurable benefit has been conferred upon the bankruptcy estate.

## III. The Proper Remedy for the United States Is To Proceed Against Mr. Younger Personally, Rather than Claiming First Priority to the Assets of the Bankruptcy Estate.

The denial of administrative expense priority does not leave the United States without a remedy against Mr. Younger; the United States would simply not be entitled to first priority treatment for its claim. *See* 11 U.S.C. § 507(a)(1). The automatic stay does not prevent the United States from pursuing ordinary judicial actions and remedies against Mr. Younger. *See e.g., In re Lewis*, 33 B.R. 98 (Bankr. W.D.N.Y. 1983) (postpetition creditor denied administrative priority as proper remedy was to advance claim in state court). The Marshals Service should pursue its claim against Mr. Younger personally, just as a private health care provider would be required to do had Mr. Younger not been incarcerated at the time he sought medical treatment.

## CONCLUSION

The Eleventh Circuit's departure from the accepted and usual construction of § 503 of the Bankruptcy Code necessitates review of whether a debtor's postpetition medical expenses while incarcerated are administrative expenses of the estate or personal postpetition expenses of the debtor.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 94-8573

D.C. Docket No.4: 93-00181-CV

Filed March 27, 1995

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IN RE: HAROLD F. YOUNGER,

*Debtor.*

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DONNA E. YOUNGER,

*Plaintiff-Appellant,*

versus

UNITED STATES OF AMERICA,

*Defendant-Appellee,*

ROBERT L. COLEY, Assistant U.S. Trustee; JAMES L. DRAKE, JR.; PAUL GREGORY JUSTICE, Assistant United States Attorney,

*Interested Parties.*

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Appeal from the United States District Court
for the Southern District of Georgia

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Before TJOFLAT, *Chief Judge*, BARKETT, *Circuit Judge*, and CLARK, *Senior Circuit Judge*.

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PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

---

Case Number: CV493-181

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IN MATTER OF:
HAROLD F. YOUNGER,

*Debtor.*

---

DONNA E. YOUNGER,

*Appellant,*

—v.—

UNITED STATES OF AMERICA

---

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict, considered.

Decision by Court. This action came [deleted] before the Court. The issues have been [considered] and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the decision rendered on the 15th day of April 1994, the Order of Bankruptcy Court has been affirmed except for the Bankruptcy Court alternative holding.
April 15, 1994

Henry R. Crumley, Jr.
*Clerk*

Nicole M. Thomas
*(By) Deputy Clerk*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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Case Number: CV493-181

Filed April 15, 1994

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In the matter of
Harold F. Younger,

*Debtor.*

---

Donna E. Younger,

*Appellant,*

—vs.—

United States of America,

*Appellee.*

---

ORDER

Appellee United States of America (United States) filed an application for administrative expenses seeking compensation of expenses incurred by the United States Marshals Service (Marshals Service) due to the incarceration and subsequent need for medical treatment of the debtor, Harold F. Younger

(Mr. Younger). Donna E. Younger (Mrs. Younger), Mr. Younger's former wife and primary creditor, opposed recovery of these expenses on the ground that they were personal to the debtor and not beneficial to the estate. By order dated June 16, 1993, the bankruptcy court held that the expenses were entitled to administrative expense priority. *See Matter of Younger*, 163 B.R. 609 (Bankr. S.D. Ga. 1993). This appeal by Mrs. Younger ensued.

## BACKGROUND

As part of the civil divorce action instituted by Mrs. Younger against Mr. Younger, the Superior Court of Chatham County entered a judgment of $912,635.00 on January 10, 1992, against Mr. Younger to restore Mrs. Younger's non-marital property. Mr. Younger exhausted all appellate remedies on March 12, 1992. Between March 13 and March 18, 1992, Mr. Younger transferred substantial amounts of money from local brokerage firms to out-of-town banks; he later withdrew the money from these banks and dispersed it by cashier's checks payable to relatives and friends who claimed no interest in the money. On March 18, 1992, Mrs. Younger discovered that Mr. Younger's residence telephone had been disconnected and that all furniture had been removed from his apartment. She was later informed that Mr. Younger had moved from the apartment approximately two weeks earlier.

On March 27, 1992, Mrs. Younger filed an involuntary Chapter 7 petition against Mr. Younger. Mr. Younger could not be personally served, and the bankruptcy court ordered service by publication. In response to Mrs. Younger's motion, the bankruptcy court entered an order on April 28, 1992, requiring Mr. Younger to submit to an examination pursuant to Bankr. R. 2004 on May 5, 1992. Mr. Younger failed to appear at this examination. He also failed to file a statement of financial affairs and a schedule of assets and liabilities due on June 10, 1992, under a court order.

On June 11, 1992, Mrs. Younger moved the bankruptcy court for an order directing the Marshals Service to bring Mr.

Younger before the court without unnecessary delay for the purpose of a hearing under Bankr. R. 2005(a).[1] The bankruptcy court referred this matter to the undersigned judge to determine whether the relief sought should be considered by that court or this court. On June 12, 1992, this Court withdrew the reference for the limited purpose of considering Mrs. Younger's motion. The Honorable John F. Nangle, United States District Judge, granted Mrs. Younger's motion on June 16, 1992, and ordered the United States Marshal of any district in which Mr. Younger may be found to apprehend him to insure his appearance for the Rule 2004 examination. The Marshals Service apprehended Mr. Younger on June 25, 1992, and ordered his transfer to this district.

The Honorable G. R. Smith, United States Magistrate Judge, ordered Mr. Younger to submit to a Rule 2004 examination. During the June 27, 1992, examination, Mr. Younger invoked his Fifth Amendment privilege against self-incrimination. Although this Court and the Superior Court of Chatham County subsequently granted Mr. Younger immunity from prosecution, Mr. Younger continued to refuse to testify at a Rule 2004 examination. While he was incarcerated for refusal to testify, Mr. Younger was hospitalized and underwent surgery for a heart condition and gall bladder problems.

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[1] That section provides as follows:

> On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal . . . an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

Bankr. R. 2005(a).

On November 20, 1992, this Court found Mr. Younger in contempt of court for his continued refusal to testify.[2] As a result of Mr. Younger's incarceration, hospitalization, and surgeries, the Marshals Service incurred expenses totalling $111,854.45. The bulk of these expenses went toward paying Mr. Younger's medical care.

On October 2, 1992, and on April 5, 1993, the United States filed applications for allowance of these expenses. Despite Mrs. Younger's objections that the expenses were incurred for the personal benefit of the debtor, the bankruptcy court found that these expenses were entitled to administrative priority for two reasons: They preserved the estate, and they continued the viability of the bankruptcy process by allowing incarceration of a debtor to coerce his compliance with federal law.

## DISCUSSION

Mrs. Younger contends that the bankruptcy court erroneously found that administrative expenses under 11 U.S.C. § 503(b) include the costs incurred in executing an order to bring a debtor before the court, in holding a debtor in custody as ordered by the court pending completion of a Rule 2004 examination, and in providing medical services to an incarcerated debtor. She claims that the health care expenses are Mr. Younger's personal living expenses, not those of the estate; that these expenses do not confer a benefit to the estate; and that the costs should not be treated as an unlisted expense under section 503. The United States counters that Mr. Younger's incarceration prevents him from further concealing the property of the estate and that the Marshals Service has a constitutional obligation to provide reasonable medical care to incarcerated persons. As noted by the bankruptcy court and the parties, this case presents a question of first impression.

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[2] Although this Court ordered Mr. Younger incarcerated indefinitely, the Eleventh Circuit found that 28 U.S.C. § 1826 required his release at the end of the court proceeding or eighteen months, whichever is less. *Matter of Younger*, 986 F.2d 1376 (11th Cir. 1993).

In evaluating these claims, the Court reviews the bankruptcy court's findings of fact under the clearly erroneous standard, and reviews the bankruptcy court's conclusions of law de novo. *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381 (11th Cir. 1990). The bankruptcy court, however, has broad discretion in applying section 503(b). *Sapir v. C.P.Q. Colorchrome Corp. (In re Photo Promotion Assocs., Inc.)*, 881 F.2d 6 (2d Cir. 1989); *accord Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700 (9th Cir. 1988).

**Section 503(b) generally**

The applicable statute provides in pertinent part as follows:

> (b) After notice and a hearing, there shall be allowed, administrative expenses. . . , including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. . .

11 U.S.C.A. § 503(b)(1)(A) (1993). Although certain types of administrative expenses are listed in the statute, the designations contained in section 503(b) are not exhaustive since use of the word "including" in the statute is not limiting. 11 U.S.C. § 102(3) (1993); *accord United States v. Crenshaw (In re Allied Mechanical Servs., Inc.)*, 885 F.2d 837 (11th Cir. 1989). Expenses not explicitly listed in the statute can receive administrative expense status in one of two ways: as a nonlisted "actual, necessary" expense of preserving the estate under section 503(b)(1)(A) or as a nonlisted administrative expense under section 503(b) in general. *Alabama Surface Mining Comm'n v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.)*, 963 F.2d 1449 (11th Cir. 1992); *see generally* 3 L. King, Collier on Bankruptcy ¶ 503.03 (15th ed. 1993).

In *N.P. Mining*, the Eleventh Circuit examined whether punitive civil penalties assessed by the state for postpetition strip mining qualified as an administrative expense in a Chapter 11 case. The court first noted the interpretation of section

503(b)(1)(A) given by other courts: "Any claim for administrative expenses and costs must be the actual and necessary costs of *preserving the estate for the benefit of its creditors*." *N.P. Mining*, 963 F.2d at 1454 (*quoting Dant & Russell*, 853 F.2d at 706) (emphasis added).[3] It then noted that this restrictive interpretation ignored policies involved in section 503(b) and that the Supreme Court had not construed the section narrowly. *Id.* at 1454. It quoted the following passage from *Reading Co. v. Brown*, 391 U.S. 471, 484-84 (1968)(emphasis added):

> . . ."[A]ctual and necessary costs" should include *costs ordinarily incident to operation of a business*, and not be limited to costs without which rehabilitation would be impossible . . . In *some cases* arising under Chapter XI it has been recognized that "actual and necessary costs" are not limited to those claims which the business must be able to pay in full if it is to be able to deal at all.

*Id.* Since only "some cases" in which costs ordinarily incident to operation of a business are afforded administrative expense priority, the Eleventh Circuit found that a policy of ensuring compliance by trustees with state law served as sufficient justification for affording punitive civil penalties administrative expense priority as nonlisted "actual, necessary costs and expenses of preserving the estate" under section 503(b)(1)(A). *Id.* at 1458-59. This result accrued even though the expenses conferred no actual benefit upon the estate. *Id.* at 1454.

After discussing *N.P. Mining*, the bankruptcy court concluded that the expenses and costs at issue were entitled to administrative expense priority for two reasons. First, the expenses and costs were necessary and served to preserve the estate in that Mr. Younger's incarceration halted his dissipation of the estate. Second, even if Mr. Younger's incar-

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[3] An earlier Eleventh Circuit case discussing section 503(b) held that "there must be an actual, concrete benefit to the estate before a claim is allowable as an administrative expense." *Broadcast Corp. of Georgia v. Broadfoot ( In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530, 1532 (11th Cir. 1986) (citation omitted) (discussing administrative expense priority of an executory contract).

ceration was not necessary to preserve the estate, "the ultimate power to incarcerate a debtor under Bankruptcy Rule 2005 for the purpose of guaranteeing his appearance at a Bankruptcy Rule 2004 examination and thereafter to attempt to coerce his compliance with federal law is of such critical importance to the viability of the bankruptcy process that the costs incident to that incarceration are no less deserving of priority classification than the costs incident to operating a business." *Younger*, 163 B.R. at 612. The bankruptcy court also held that the allowances were not subject to disallowance as unnecessary, rejecting Mrs. Younger's argument that the expenses were incurred for the personal well-being of Mr. Younger.

**Treatment as an actual and necessary expense**

As noted above, the bankruptcy court found that the expenses incurred by the Marshals Service were necessary to preserve the estate and had served to protect the estate. Mr. Younger's incarceration "guarantee[d] his inability to conceal himself and substantially restrict[ed] his ability to transfer or conceal his assets." *Id.* On appeal, Mrs. Younger maintains that the costs of detaining Mr. Younger conferred no benefit upon the estate because the Marshals Service has not actively attempted to locate assets for the estate and that Mr. Younger's continued refusal to submit to a Rule 2004 examination has resulted in no additional information to the estate.

Mrs. Younger's arguments fail to address the bankruptcy court's finding that Mr. Younger's incarceration *prevented* him from further dissipating or concealing property of the estate. Mrs. Younger briefly addresses this holding in her argument that costs of medical care should not be treated as an administrative expense. Br. of Appellant, p. 13. She states that "[t]his rationale may purport to explain the expenses for the actual detention of [Mr. Younger] but it is impossible to conceive how, if at all, the provision of medical care to the Debtor prevented him from concealing assets." *Id.* Even if Mr. Younger's incarceration has not resulted in his willingness to testify at a Rule 2004 examination, his arrest and

incarceration have conferred an actual and necessary benefit on his estate: Mr. Younger's ability to transfer or hide his assets, the event precipitating the involuntary petition filed by Mrs. Younger, has been limited by his incarceration. In fact, during the pendency of this matter, nearly $400,000.00 of Mr. Younger's assets have been obtained by the Trustee. *Younger*, 163 B.R. at 610.

In sum, incarceration of Mr. Younger conferred an "actual, concrete benefit" upon the estate by allowing the recovery of $400,000.00 and served to preserve the estate by precluding Mr. Younger from further transfers to dissipate the estate. Although Mr. Younger ultimately did not testify at a Rule 2004 examination, his incarceration secured his attendance at any such examination. As a result, the costs of incarceration of Mr. Younger are entitled to administrative expense priority as nonlisted "actual, necessary costs and expenses of preserving the estate" pursuant to section 503(b)(1)(A).

**Medical care rendered to the debtor**

Even if the costs of incarceration benefitted the estate by stopping Mr. Younger from dissipating his assets, Mrs. Younger contends that the estate should not bear the expenses of Mr. Younger's medical care while incarcerated. Mrs. Younger makes several arguments: the United States has the responsibility for providing medical care to persons in its custody, the expenses benefitted the debtor personally, and she should not be penalized for invoking her right to discovery.

Since Mr. Younger's incarceration conferred an actual and necessary benefit upon the estate, all costs attendant to that incarceration, including the current medical expenses, should be borne by the estate. When the Marshals Service incarcerated Mr. Younger pursuant to lawful order of the bankruptcy court, it assumed constitutional and statutory duties to provide him with reasonable medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (discussing government's Eighth Amendment obligation "to provide medical care for those whom it is punishing by incarceration"); 18 U.S.C.A. §§ 4005, 4006 (1985) (instructing furnishing and payment of medical care).

By invoking the process described in Rule 2005, Mr. Younger's creditors—in this instance, his wife—instituted an action admittedly to benefit the estate.[4] Upon the creditor's invocation of Rule 2005, the Marshals Service had no choice but to provide medical care to Mr. Younger during his incarceration; accordingly, the estate should bear this burden.

Given the constitutional and statutory duties to provide medical care to Mr. Younger, the expenses of medical care incurred by the Marshals Service cannot be considered personal to Mr. Younger. The underlying benefit to the bankruptcy estate renders the four cases relied upon by Mrs. Younger inapposite since each case involves an expenditure of no benefit to the estate. *See United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986) (denying administrative expense treatment to support payments for the debtor's wife and children); *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14 (Bankr. 9th Cir. 1988) (refusing to permit debtor use of estate assets to pay for debtor's personal living expenses since such an action would benefit only the debtor, not the estate); *In re Deraves*, 81 B.R. 127 (Bankr. S.D. Fla. 1987) (declining to allow the debtor to use estate property to purge a contempt sanction in state court); *In re Vincent*, 4 B.R. 21 (Bankr. M.D. Tenn. 1979) (refusing to permit payment of necessary living expenses from assets of the estate despite the fact that the debtor suffered a heart attack).

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[4] Mrs. Younger appears to concede that the arrest pursuant to Rule 2005 benefits the estate. Her appellate brief states as follows:

> The bankruptcy court also pointed out that the costs and fees of the Marshals Service were incurred because of the "result of a court order sought by a private litigant [Mrs. Younger], a creditor who expected or hoped to reap a benefit from utilizing this procedure." (p. 11). However, with all due respect to the Bankruptcy Court, it has misconstrued the purpose of Fed. R. Bank. P. 2005. The procedure outlined under Fed. R. Bankr. P. 2005 is not a remedy that is available for the benefit of a creditor. . . Rather, **it is a procedure employed for the benefit of the bankruptcy process as a whole** in order to bring the debtor before the court for the purposes of a Rule 2004 examination.

Br. of Appellants, p. 11 (emphasis added).

Mrs. Younger finally contends that giving administrative expense priority to these expenses would penalize her for securing a Rule 2004 examination of Mr. Younger. As part of this argument, she notes that Rule 2005 is employed to benefit the bankruptcy process as a whole in that it allows parties to obtain information from a reluctant debtor who refuses to cooperate with a Rule 2004 exam. Her explanation of the process belies her argument that having creditors bear the costs of incarceration penalizes her; By allowing the arrest of Mr. Younger, the bankruptcy court ensured that his creditors, including Mrs. Younger, would have a chance to obtain information from an elusive debtor and halt the spread of vanishing assets. While Mrs. Younger is Mr. Younger's only known creditor at the present time, requiring payment of these expenses from the bankruptcy estate does not penalize her; it benefits her and the bankruptcy process as a whole.[5]

**Treatment as a nonlisted expense under N.P. Mining**

Mrs. Younger attacks the bankruptcy court's alternative holding that coercing Mr. Younger's compliance with federal law is of such vital importance to the bankruptcy process that costs incident to incarceration are no less deserving of priority classification than the costs incident to operating a busi-

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[5] Although not cited by either party, the Court has considered the following statute:

> The expenses attendant upon the confinement of persons arrested and committed under the laws of the United States . . . shall be paid out of the Treasury of the United States in the manner provided by law.

18 U.S.C.A. § 4007 (1985 & Supp. 1994). Section 4007 does not change the result in the case at bar. The costs of Mr. Younger's incarceration and medical care initially were paid out of the Treasury; nothing in the statute prevents the United States from seeking repayment from the responsible party. In fact, within the criminal context this statute serves as authorization for U.S.S.G. § 5E1.2(i). Pub. L. 100-690, 102 Stat. 4463 (1988) (*cited in* 18 U.S.C.A. § 4007 (Supp. 1994)). Section 5E1.2(i) permits a court to impose an additional fine upon a convicted defendant in an amount "at least sufficient to pay the costs to the government of any imprisonment . . ." Section 4007's authorization of section 5E1.2(i) indicates that the United States properly may seek all costs of incarceration from the responsible party.

ness. In reaching this conclusion, the bankruptcy court rejected Mrs. Younger's argument that *N.P. Mining* turned on the fact that the fines were incidental to the operation of a business and stated that "policies other than benefit to or preservation of the estate operate[d] to confer administrative expense priority." *Younger*, 163 B.R. at 612.

This Court believes that *N.P. Mining* requires that the claimed costs be ordinarily incident to the operation of a business. *N.P. Mining* analyzed *Reading*'s holding that in "some cases," costs ordinarily incident to operation of a business could be afforded administrative expense priority. The civil fines at issue in *N.P. Mining* fell into the "some cases" category because they were ordinarily incident to operation of the debtor's business *and* a strong federal policy, compliance with state law, existed. *N.P. Mining*, 963 F.2d at 1458. In the case at bar, only one of the *N.P. Mining* factors existed; a strong federal policy. Accordingly, the expenses sought by the Marshals Services are not entitled to administrative expense priority under *N.P. Mining*.

**Conclusion**

In this unusual case of first impression, the Court finds that the costs and expenses attendant to Mr. Younger's incarceration are entitled to administrative expense priority as actual and necessary costs of preserving the estate. Since the costs of incarceration necessarily include the costs of Mr. Younger's medical care, these expenses also are entitled to administrative expense status. The Court disavows the bankruptcy court's alternative holding under *N.P. Mining* since these costs were not ordinarily incident to operation of a business.

SO ORDERED this 15th day of April, 1994.

B. AVANT EDENFIELD

B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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Chapter 7, Case Number 92-40607
Filed June 16, 1993

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In the matter of:

HAROLD F. YOUNGER,

*Debtor*

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ORDER ON MOTION OF UNITED STATES OF AMERICA FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE

This case presents a question of first impression of immense difficulty. Debtor is before this court as a result of an involuntary proceeding filed by his ex-wife, Donna Younger. She claims that Debtor is obligated to her as a result of a divorce decree in the amount of $912,635.00 (*see* proof of claim filed 10/20/92) . Debtor allegedly violated the terms of a Superior Court injunction against transferring any property following the divorce which led to the filing of this case whereby the ex-wife sought to preserve and collect his assets and subject them to creditors' claims. Debtor could not be served personally at the outset of the case and service by publication was ordered. He subsequently obtained actual notice of the pendency of this case but failed to answer the involuntary petition which led to entry of an order for relief. *See Matter of Younger*, Chapter 7 Case No. 92-40607, Adv. No. 92-4156, slip op. at 9 (Bankr. S.D.Ga. May 13, 1993). On April 28, 1992, this court issued an order requiring Debtor to attend a Rule 2004 examination. Debtor did not respond to the

order. The Debtor also failed to respond to the court's order of May 26, 1992, requiring a schedule of assets and liabilities to be filed with the court. Subsequently, Mrs. Younger, having difficulty tracing Debtor's assets, petitioned the court to issue an order for Mr. Younger's apprehension in order to compel his attendance at the 2004 examination. *See* Order signed by United States District Court Judge John F. Nangle directing Debtor's apprehension filed June 16, 1992, and attached as Government's Exhibit "I" to the Application for Allowance of Administrative Expenses and Assessment of Fees. Debtor was mailed, on or about May 31, 1992, a notice of commencement of bankruptcy case listing the required meeting of creditors as June 22, 1992. Debtor received actual notice of the bankruptcy proceedings, and nevertheless failed to appear at the creditors' meeting scheduled in June. *See generally Matter of Younger, supra*, slip op. at 7-9. Debtor was arrested on or about June 25, 1992, when a United States Magistrate Judge in Jacksonville, Florida, issued an order requiring the United States Marshal to return Debtor to Savannah. *See* Exhibit "J" to the Government's application.

Debtor was brought to this jurisdiction and attended a Rule 2004 examination on June 27, 1992. However, he refused to answer any questions concerning his estate citing his privilege against self incrimination. Thereafter, Mrs. Younger sought and obtained a determination that granted Debtor immunity from prosecution pursuant to 11 U.S.C. Section 344. He was thereafter ordered to respond and continued to refuse. He remained incarcerated during the period of his refusal to testify. Ultimately, he was cited for contempt for his failure and refusal to testify after the grant of immunity, found by the United States District Court to be in contempt, and incarcerated. *See* Exhibit "K" Plaintiff's Brief in Response to Motion to Dismiss Adversary Proceeding No. 92-4156. He remains in federal custody despite repeated advice that he would be released in the event his testimony was given as ordered.

At some point in this long process Debtor became ill and was hospitalized with heart problems. He underwent surgery while in the custody of the United States Marshals Service pursuant to the Bankruptcy Rule 2005 order. Later he developed gall bladder problems and surgery was performed to correct that problem as well.

The claim asserted by the United States Marshals Service in this proceeding is for repayment of the expenses incurred for Debtor's arrest, custody, and medical treatment while in custody. The Service seeks allowance of its claim in the amount of $111,854.45 for these expenses as a claim entitled to administrative priority pursuant to 11 U.S.C. Section 503(b)(1)(A) which provides in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate . . . .

The United States contends that all the expenses incurred are actual and necessary costs to preserve the estate under these facts where a contemptuous debtor who has concealed evidence concerning his assets has forced a creditor to invoke the most coercive methods available to force debtor to comply with the dictates of federal law. But for the order to incarcerate Debtor he clearly would never have made an appearance or voluntarily complied with any legal obligations related to this case. But for his incarceration Debtor would have been free to secrete himself and freely transfer and conceal his assets. During the pendency of this case nearly $400,000.00 of Debtor's assets have, in fact, been obtained by and are presently held by the Trustee. On these facts the United States argues that administrative expense priority is warranted as these costs were necessary to preserve the estate or alternatively, to the extent that no specific benefit can be shown, are allowable under Eleventh Circuit authority which

accords priority to certain post-petition expenses not expressly listed in Section 503.

Mrs. Younger contends that, as to all or most of the expenses and particularly the medical expenses, they are post-petition expenses that benefit the Debtor personally and not the estate and should be classified as post-petition debts incurred by Debtor that will not be discharged. Obviously, allowance of these expenses will deplete the estate presently worth $400,000.00 from which Mrs. Younger can be paid by an additional $111,854.45. Since her claim alone exceeds $900,000.00 she cannot be paid in full from funds in the Trustee's hands—thus, any allowance of administrative expense for these items reduces dollar for dollar her ultimate recovery.[1]

The perversity of this case is that in truth neither Mrs. Younger nor the United States should be penalized for the costs arising out of Debtor's conduct which is so contemptuous and reprehensible to be beyond words. Unfortunately, however, that cost must be borne by one or the other of them unless and until additional assets are recovered or post-bankruptcy collection efforts succeed where bankruptcy law has failed. The parties agree that this is a case of first impression on which neither side has found controlling authority. Thus, there is no precedent either for allowing or denying the relief sought.

In making this determination it is clear that the allowance of such claims is an area where the court is accorded broad discretion. *See In re Butcher*, 108 B.R. 634, 636 (E.D.Tenn. 1989). Clearly an expense such as this is not expressly enumerated in the statute. However, "the use of the word 'includ-

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[1] In actuality it is unknown whether Debtor has any other creditors since he has never filed schedules or testified concerning his financial affairs. *See* Transcript of Examination of Debtor filed July 17, 1992. If, in fact there are other creditors Mrs. Younger's share of the estate would be diluted and allowance of this or any other administrative expense would reduce her ultimate recovery pro-rata rather than dollar-for-dollar. For purposes of this order reference to Mrs. Younger shall be deemed to include other creditors who are hereafter identified.

ing' as the last word in the lead-in sentence of Section 503(b) . . . is not limiting. A court might well conclude that there are to be allowed as administrative expense claims not necessarily precisely covered by the provisions of Section 503(b)." *Collier* at 503-17. The Eleventh Circuit has cited *Collier* with approval and held that the express items listed in Section 503 are not limiting. As *Collier* notes, the Code makes no attempt

> to enumerate specifically all of the potential items of expense which could constitute "the actual, necessary costs and expenses of preserving the estate" . . . .

3 L.King, *Collier on Bankruptcy*, ¶ 503.04[1][a][i] at 503-19 (15th Ed. 1991).

The latest interpretation of Section 503(b) of the Bankruptcy Code by the Eleventh Circuit is found in *In re N.P. Mining Co., Inc.*, 963 F.2d 1449 (11th Cir. 1992). The precise issue before the court was whether and for how long post-petition, punitive, non-tax penalties can be accorded administrative expense status under Section 503(b). Recognizing the federal policy of requiring trustees to operate an estate in compliance with state law, the court held that punitive, civil penalties assessed post-petition against a Chapter 11 debtor as punishment for environmental violations qualified as administrative expenses to the extent they were incurred as consequences of mining operations while debtor's strip mining business was still operating. *Id.* at 1453.

In reaching its holding, the Eleventh Circuit emphasized the inclusive nature of the language in Section 503(b):

> The legislative history of Section 503(b), as well as the legislative history of other relevant sections of the Bankruptcy Code, is silent regarding the treatment of punitive postpetition penalties. It is clear from the face of the statute, however, that expenses not explicitly listed in Section 503(b) can receive administrative-expense status in one of two ways, either as a nonlisted "actual, necessary" expense of preserving the estate

> under 503(b)(1)(A) or as a nonlisted administrative expense under 503(b) in general. Either way, there is room in the statute for courts to accord administrative-expense priority to postpetition expenses, and courts have given this status to certain categories of postpetition claims that are not explicitly listed in the statute.

963 F.2d at 1452. *See also In re Allied Mechanical Services, Inc.*, 885 F.2d 837 (11th Cir. 1989) (where the court held that, notwithstanding the legislative silence under Section 503(b), the United States was entitled to administrative expense priority on its claim in Chapter 7 liquidation for interest accrued on tax liability incurred while debtor was operating under Chapter 11 reorganization).

In *N.P. Mining, supra*, the Eleventh Circuit rejected a narrow interpretation of Section 503(b)(1)(A) and expressly found that administrative expenses could be awarded based upon other policy considerations, without a specific finding that there was a measurable benefit to the estate. *N.P. Mining* at 1454. In doing so the court allowed as administrative expenses punitive civil fines for environmental violations incident to the operation of a business above and beyond any clean up costs and in the absence of any proof that any of the violations constituted a health hazard or imminent risk to public safety.

While Mrs. Younger's counsel argues that the outcome in *N.P. Mining* turned on the fact that the fines were incidental to the operation of a business, and therefore is not controlling, I find the rationale of *N.P. Mining* to be broader. The court recognized that policies other than benefit to or preservation of the estate operate to confer administrative expense priority. It found Congress' intent to be that "first priority claims include claims other than those that serve to preserve the bankruptcy estate." *Id.* at 1456. Because of the policy established in 28 U.S.C. Section 959(b) the Eleventh Circuit ruled that the fines were allowable administrative expenses even though the result would be to deplete the estate.

I conclude that the expenses at issue are entitled to administrative expense priority for two reasons: First, I find the expenses and costs were necessary and have served to preserve the estate. By his conduct Debtor clearly could be expected to conceal and transfer assets. His incarceration, after refusal to abide by the Code requirements for disclosure and specific court orders to testify, guarantees his inability to conceal himself and substantially restricts his ability to transfer or conceal his assets. Absent his incarceration it is obvious that Debtor would have engaged in conduct that would dissipate the estate. While the monetary benefit may be incapable of exact quantification the existence of benefit is undeniable. Certainly this creditor expected that a benefit would accrue from the actions taken in her behalf and should not now be heard to complain that the benefits are "hypothetical and highly speculative" particularly when she could at any time prior to the adjudication that Debtor was in contempt have moved the court to release Debtor. *See* page 5 of Mrs. Younger's Brief filed May 18, 1993. Having failed to do so, and thus continued the accrual of these expenses it is highly inconsistent to complain of "purported benefits" of the expenses incurred by the Marshals Service.

Second, even if necessity to preservation of the estate is in question I find that the ultimate power to incarcerate a debtor under Bankruptcy Rule 2005 for the purpose of guaranteeing his appearance at a Bankruptcy Rule 2004 examination and thereafter to attempt to coerce his compliance with federal law is of such critical importance to the viability of the bankruptcy process that the costs incident to that incarceration are no less deserving of priority classification than the costs incident to operating a business. *See generally Reading Co. v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 1766-67 (1968). These expenses should not be borne by the United States. It incurred these expenses not as a volunteer but as the result of a court order sought by a private litigant, a creditor who expected or hoped to reap a benefit from utilizing the procedure. However, these expenses should not be borne by a peti-

tioning creditor alone but by the creditors as a group for whose benefit the estate is administered.[2]

Finally, the expenses are not subject to disallowance as unnecessary. Contrary to the assertions of Mrs. Younger's counsel that they were incurred for the "personal well-being of the debtor" I find that they were not incurred principally for that reason. Instead, medical services were rendered pursuant to the government's responsibility toward individuals in custody to provide necessary medical care[3] and pursuant to the creditors' desire to continue, even after Debtor's health condition was known, to maintain Debtor in custody as a tool to secure his cooperation. That Debtor may incidentally have benefitted does not alter the fact that the motivation for the incarceration was not altruistic on the creditors' or the Marshals Service part.

For the foregoing reasons, I hold that the expenses incurred by the United States Marshals Service in the amount of $111,854.45 are allowed and entitled to administrative expense priority pursuant to 11 U.S.C. Section 503(b)(1)(A).

LAMAR W. DAVIS, JR.
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 10th day of June, 1993.

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[2] While in practice Mrs. Younger, as the largest creditor, may bear the brunt of this expense it is because of her status as a creditor not because she initiated the action.

[3] *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989).

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No. 94-2115

# In the Supreme Court of the United States

OCTOBER TERM, 1995

DONNA E. YOUNGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

## QUESTION PRESENTED

Whether the costs of providing medical treatment to a debtor held in the custody of the United States Marshals Service pursuant to Fed. R. Bankr. P. 2005 were properly treated as administrative expenses entitled to priority treatment under 11 U.S.C. 503(b).

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 94-2115

DONNA E. YOUNGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The decision without opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-15a) is reported at 165 B.R. 965. The opinion of the bankruptcy court (Pet. App. 16a-23a) is reported at 163 B.R. 609.

### JURISDICTION

The judgment of the court of appeals was entered on March 27, 1995. The petition for a writ of certiorari was filed on June 26, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Distribution of the property of an estate in a Chapter 7 bankruptcy proceeding is governed by the priorities established in 11 U.S.C. 507. 11 U.S.C. 726(a). Under Section 507(a), claims for administrative expenses are accorded highest priority. 11 U.S.C. 503(b) defines the set of expenses that may receive priority as administrative expenses:

> After notice and a hearing, there shall be allowed, administrative expenses * * * including—
>
> > (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of [a] case.

That provision allows certain expenditures made after an individual or entity is placed in bankruptcy to be paid ahead of the ordinary claims of creditors, ensuring that necessary efforts will be made for "the consolidation and distribution of the estate's assets to the benefit of the creditors." *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 122 (6th Cir. 1987).

The Federal Rules of Bankruptcy Procedure provide that a debtor may be required to submit to an examination by the court. Fed. R. Bankr. P. 2004. Where a debtor who is necessary to the administration of the estate seeks to avoid appearing for examination, "the court may issue to the marshal * * * an order directing the officer to bring the debtor before the court without unnecessary delay." Fed. R. Bankr. P. 2005(a).

2. In a divorce proceeding, the Superior Court of Chatham County awarded petitioner a judgment of $912,635 against her former husband, Harold F.

Younger. After he had exhausted his appeals, Mr. Younger transferred large amounts of money from local accounts to out-of-town banks. He later withdrew those funds and distributed them among friends and relatives. On March 18, 1992, petitioner discovered that Mr. Younger had vacated his apartment and removed all his furniture. Pet. App. 6a.

3. Petitioner instituted involuntary Chapter 7 proceedings against Mr. Younger on March 27, 1992. The bankruptcy court issued an order requiring Mr. Younger to submit to an examination pursuant to Fed. R. Bankr. P. 2004. Mr. Younger failed to appear at that examination and disregarded a subsequent court order to submit a schedule of assets and liabilities by June 10. Pet. App. 6a. On June 16, a district judge granted petitioner's motion for an order directing the Marshals Service to bring Mr. Younger before the court for purposes of an examination. *Id.* at 6a-7a. The Marshals Service apprehended Mr. Younger on June 25, and a United States Magistrate Judge ordered him to submit to a Rule 2004 examination. At the examination on June 27, Mr. Younger asserted his Fifth Amendment privilege against self-incrimination and refused to answer questions. The court granted Mr. Younger immunity from prosecution, but he persisted in refusing to testify. Pet. App. 7a.

The court found Mr. Younger in contempt for refusing to testify and ordered him incarcerated. During the period of his confinement, Mr. Younger developed acute heart and gall bladder problems, was hospitalized, and underwent surgery. Pet. App. 7a-8a. Mr. Younger's incarceration cost the Marshals Service $111,854.45, most of which was used to provide medical care. *Id.* at 8a.

4. On October 2, 1992 and April 5, 1993, the United States filed applications for allowance of its expenses incident to incarcerating Mr. Younger. The bankruptcy court concluded that the expenditures were actual, necessary costs of preserving the estate and thus should receive priority as administrative expenses under 11 U.S.C. 503(b). Pet. App. 8a, 22a. The court found that Mr. Younger's incarceration conferred an actual benefit on the estate, explaining that Mr. Younger "would have engaged in conduct that would dissipate the estate" if he had not been in custody. *Id.* at 22a. On petitioner's appeal, the district court likewise concluded that the costs of incarceration were properly treated as administrative expenses because Mr. Younger's "arrest and incarceration have conferred an actual and necessary benefit on his estate" by limiting his "ability to transfer or hide his assets." *Id.* at 11a-12a. The court noted that the estate had recovered nearly $400,000 from Mr. Younger during the pendency of the action. *Id.* at 12a. Observing that the Marshals Service "assumed constitutional and statutory duties to provide [Mr. Younger] with reasonable medical care" during the period of his incarceration, *ibid.*, the court held that "[s]ince the costs of incarceration necessarily include the costs of Mr. Younger's medical care, these expenses also are entitled to administrative expense status." *Id.* at 15a.

The court of appeals affirmed without opinion. Pet. App. 1a-2a.

## ARGUMENT

Petitioner does not contend that the decision of the court of appeals directly conflicts with this Court's precedents or that the case involves a disagreement

among the circuits. She argues instead that the courts below deviated from the ordinary manner of adjudicating claims for administrative expenses under 11 U.S.C. 503(b). Pet. 6. That argument is without merit. The district court properly applied Section 503(b) to the facts of this case. The court's findings of fact were not clearly erroneous, and the court of appeals correctly affirmed its decision. The decision turns on case-specific factual findings, and further review is not warranted.

1. Section 503(b)(1)(A) provides that any "actual, necessary costs and expenses of preserving the estate" receive priority as administrative expenses. Section 503(b) lists examples of the kinds of expenses that qualify as administrative, but that list is not intended to be exhaustive. As the Bankruptcy Code's rules of construction make clear, the word "including"—which is used in introducing the subsections of Section 503(b) and again in Section 503(b)(1)(A), the particular subsection pertinent here—should not be read as limiting administrative expenses to the particular items listed. 11 U.S.C. 102(3); see *In re Colortex Industries, Inc.*, 19 F.3d 1371, 1377 (11th Cir. 1994); 3 L. King, *Collier on Bankruptcy* ¶ 503.04, at 503-20 (15th ed. 1995). The application of Section 503(b) therefore requires the exercise of considerable judgment, and bankruptcy courts are accorded "broad discretion in determining whether to award administrative expense priority." *In re Dant & Russell, Inc.*, 853 F.2d 700, 707 (9th Cir. 1988); see also *In re Photo Promotion Associates, Inc.*, 881 F.2d 6, 8 (2d Cir. 1989); *In re Hearth & Hinge, Inc.*, 28 B.R. 595, 596 (Bankr. S.D. Ohio 1983). This Court has stated that the decision to treat particular expenses as administrative costs should be

guided by the statutory objective of "fairness to all persons having claims against an insolvent." *Reading Co.* v. *Brown*, 391 U.S. 471, 477 (1968).

To treat the costs of incarcerating Mr. Younger as administrative expenses is not, as petitioner argues, "a departure from the accepted and usual course of judicial proceedings" in bankruptcy cases, Pet. 6, but rather is consistent with courts' treatment of several other kinds of expenses. This Court has held that damages resulting from the negligence of a bankruptcy receiver are administrative expenses. *Reading*, 391 U.S. at 485. In *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 124 (6th Cir. 1987), the court held that the State of Tennessee could recover as administrative expenses the funds it spent to assess the gravity of environmental hazards on the debtor's property. See also *In re Vermont Real Estate Investment Trust*, 25 B.R. 804, 806 (Bankr. D.Vt. 1982) (municipality's expenses in removing dangerous building from leasehold of estate are administrative expense). Similarly, in *In re Allied Mechanical Services, Inc.*, 885 F.2d 837, 839 (11th Cir. 1989), the court held that the United States could recover as an administrative expense the interest on tax liabilities incurred during reorganization. See also *In re Carpet Center Leasing Co.*, 991 F.2d 682, 687 (11th Cir. 1993) (creditor's expense in providing equipment for benefit of estate is administrative expense); *In re Airlift International, Inc.*, 761 F.2d 1503 (11th Cir. 1985) (costs resulting from breach of postpetition executory contract are administrative expenses). Courts have thus recognized that a variety of expenditures, including governmental expenditures linked to bankruptcy estates, are "actual, necessary" expenses of preserving the estate. The

decision in this case is consistent with the decisions of other courts that have applied Section 503(b).[1]

2. Petitioner correctly observes (Pet. 9) that expenditures receive priority as administrative expenses only when they actually benefit the estate. See *Broadcast Corp.* v. *Broadfoot*, 789 F.2d 1520, 1532 (11th Cir. 1986). Contrary to petitioner's assertions (Pet. 10-12), however, that requirement was satisfied here. The bankruptcy court found that the incarceration actually benefitted the estate because Mr. Younger "would have engaged in conduct that would dissipate the estate" if he had not been confined. Pet. App. 22a. The district court agreed, concluding that Mr. Younger's confinement "conferred an 'actual, concrete benefit' upon the estate by allowing the recovery of $400,000 and served to preserve the estate by precluding Mr. Younger from further transfers to dissipate the estate." *Id.* at 12a.

The determination that Mr. Younger's arrest and confinement conferred an actual benefit on the estate is a case-specific factual finding subject to review under the "clearly erroneous" standard. See Fed. R. Civ. P. 52(a); *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). That finding was amply supported by the record. Before his arrest, Mr. Younger transferred large amounts of money to out-of-town accounts in violation of a court order and disbursed

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[1] Petitioner's reliance (see Pet. 13-14) on *In re Lenka*, 295 F. 570 (E.D.N.Y. 1923), and *In re Centrone Coal Co.*, 6 F. Supp. 628 (E.D.N.Y. 1934), is misplaced. Neither of those cases addressed the question whether costs of incarceration can constitute costs of preserving the estate under Section 503(b) or its predecessors, nor did either case involve a finding that the debtor's confinement had directly benefitted the estate.

the funds to friends and relatives. Pet. App. 6a, 16a. In his apparent determination to keep from his former wife the property that is legally hers, he refused to submit to examination before the bankruptcy judge and continued to refuse to testify even after his incarceration. *Id.* at 7a-8a. The courts below were fully justified in finding that Mr. Younger would have concealed and sought further to disburse his assets had he remained at liberty. Indeed, petitioner herself successfully moved for the judicial order directing Mr. Younger's arrest, *id.* at 7a, and her invocation of Fed. R. Bank. P. 2005 necessarily presumed that the arrest could be expected to benefit the estate, see Pet. App. 13a & n.4.

Finally, the costs of medical care were a necessary incident to Mr. Younger's incarceration. Once Mr. Younger was in the custody of the Marshals Service, the United States was subject to a constitutional and statutory obligation to provide treatment. See *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (Eighth Amendment requires government to respond to serious medical needs of prisoners); 18 U.S.C. 4006 (government responsible for "the reasonable and actual cost of the subsistence of prisoners in the custody of any marshal of the United States"). The courts below correctly concluded that expenditures for medical care were part of the cost of incarcerating Mr. Younger for the benefit of the estate and in the circumstances of this case were therefore entitled to priority treatment as administrative expenses under Section 503(b).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995